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State of Hawai'i
Dept. of Business, Economic Development and Tourism
Strategic Industries Division/Renewable Energy Branch
P.O. Box 2359
Honolulu, HI 96804
Attn: Allen G. Kam, AICP, HIREP EIS Manager

**Re: Hawai'i Interisland Renewable Energy Program: Wind
Final Environmental Assessment/Environmental Impact Statement
Preparation Notice**

Aloha e Mr. Allen G. Kam:

The Office of Hawaiian Affairs (OHA) has reviewed the "Hawai'i Interisland Renewable Energy Program: Wind—Final Environmental Assessment/Environmental Impact Statement Preparation Notice" (HIREP-Wind EISPN), dated November 24, 2010. Recognizing an increasing need for the development of renewable energy sources, OHA has strong reservations based on this early phase of the HIREP programmatic plan. The comments below are preliminary and represent neither an endorsement nor support, but are offered in the event HIREP-Wind moves forward:

INTRODUCTION

The Hawai'i Interisland Renewable Energy Program (HIREP) projects delivery of electricity generated primarily from Maui County where potential renewable energy sources are located to O'ahu where the power is needed. It will require an undersea interisland cable transmitting wind power between Maui County and O'ahu.

The complex nature of the program and its impacts are currently undergoing a Programmatic Environmental Impact Statement (PEIS) review. Additional EISs will still follow as applications for individual wind farm projects arise, such as one's being negotiated by Castle & Cooke on Lāna'i and First Wind on Moloka'i.

The State of Hawai'i (State), in cooperation with the U.S. Department of Energy (DOE), decided to prepare a PEIS for HIREP-Wind. The PEIS is designed to provide agencies and the public an overview of the potential impacts and benefits in the development of HIREP.

This PEIS grants no development rights or privileges to a specific wind farm project; instead, the PEIS sets a framework, identifies broad areas of concern (both location and environment), and specifies best management practices for the three (3) major HIREP components: 1) Undersea cable system including converter/inverter station infrastructure; 2) Wind farms on one or more islands in Maui County; and 3) Utility infrastructure upgrades on the island of O'ahu to receive and integrate wind energy into the electric grid.

The HIREP-Wind program is currently in the public comment period which recently completed its inaugural series of scoping meetings on the islands of O'ahu, Maui, Moloka'i and Lāna'i. Recent disclosures show momentum towards wind energy production nearing development on Lāna'i and Moloka'i, even against a tide of opposition witnessed at every scoping meeting.

Background

HIREP is a proposed renewable energy generation, transmission, and delivery program that works to realize the Hawai'i Clean Energy Initiative's (HCEI) goals of achieving 70 percent clean energy by 2030 with 30 percent from efficiency measures and 40 percent coming from renewable energy sources. HIREP would produce renewable energy from sources such as wind turbine technology on one or more islands and share the electricity and distribution to consumers.

On January 31, 2008, Hawai'i Governor Linda Lingle signed a Memorandum of Understanding (MOU) with DOE initiating DOE's formal involvement in the HCEI. The goal of the HCEI is to decrease energy demand and accelerate the use of renewable, indigenous energy resources in Hawai'i's commercial, residential, industrial, utility and transportation end-use sectors. The HCEI enumerates several goals and focuses on meeting two objectives: 1) reducing energy use through efficiency; and 2) developing indigenous, renewable energy sources.

Regulatory Framework

A decision on whether to proceed with an undertaking like this rests on numerous factors, such as schedule, availability of funding, and environmental considerations. In addressing environmental considerations, HIREP is guided by several relevant statutes (and their implementing regulations) and Executive Orders that establish standards and provide guidance on environmental and natural resources management and planning.

These include, but are not limited to, HRS Chapter 343, Clean Air Act, Clean Water Act, Noise Control, Endangered Species Act, National Historic Preservation Act, Archaeological Resources Protection Act, Resource Conservation and Recovery Act, Toxic Substances Control

Act, Executive Order 11990 (Protection of Wetlands), Executive Order 12088 (Federal Compliance with Pollution Control Standards), Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), and Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks). Key provisions of these statutes and Executive Orders are described in more detail in later sections of this comment letter.

FEDERAL REGULATORY CONTEXT

National Environmental Policy Act

The National Environmental Policy Act (NEPA) of 1969¹ requires that Federal agency decision-makers, in carrying out their duties, use all practicable means to create and maintain conditions under which people and nature can exist in productive harmony and fulfill the social, economic, and other needs of present and future generations. NEPA provides a mandate and a framework for Federal agencies to consider all reasonably foreseeable environmental effects of their proposed actions and to involve and inform the public in the decision-making process.

NEPA also established the Council on Environmental Quality (CEQ) in the Executive Office of the President to formulate and recommend national policies which ensure that programs like HIREP promote improvements to the quality of the environment. The CEQ set forth regulations² to assist Federal agencies in implementing NEPA during the planning phases of any Federal action. These regulations together with specific Federal agency NEPA implementation procedures help to ensure that the environmental impacts of any proposed decisions are fully considered and that appropriate steps are taken to mitigate potential environmental impacts.

Given that HIREP officials have pre-determined the potential for adverse environmental affects and other impacts to cultural landscapes, resources and traditions, a preliminary categorical exclusion (CATEX)/environmental assessment (EA) analysis is being sidestepped while HIREP undergoes comprehensive EIS (or PEIS in this case) scrutiny. In addition, assuming HIREP-wind power becomes a reality, HIREP officials must require an exit-strategy EIS analysis with each and every applicant proposing to supply wind generated energy highlighting best management practices (BMPs) to be taken when wind farming facilities/operations cease.

Federal Endangered Species Act

The Endangered Species Act (ESA) provides broad protection for plants, fish, and wildlife that have been listed as threatened or endangered in the U.S. or elsewhere and conserves ecosystem in which the species depend.³ Section 9 of the ESA prohibits the unauthorized "take"

¹ 42 USC 4321 et seq.

² 40 CFR Parts 1500-1508.

³ 16 USC 1531-1544.

of any endangered or threatened species of fish or wildlife listed under the ESA. "Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect species listed as endangered or threatened, or to attempt to engage in any such conduct.⁴

"Harass" has been defined by U.S. Fish and Wildlife Service (USFWS) to mean an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering.⁵ "Harm" has been defined to mean an act which actually kills or injures wildlife, and may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.⁶

Section 10 of the ESA contains exceptions and exemptions to Section 9, if such taking is incidental to the carrying out of an otherwise lawful activity, and outlines procedures for Federal agencies to follow when taking actions that may jeopardize listed species. Strict compliance with ESA notwithstanding, Hawaiian ecosystems would benefit from studies of the impacts to other non-listed but otherwise important species and, therefore, each prospective HIREP-wind energy supplier should demonstrate a bona fide interest by investing to protect as many of these species as possible.⁷

Species most identified in Hawaiian habitat include, but are not necessarily limited to, the Green sea turtle (*Chelonia mydas*), Hawksbill sea turtle (*Eretmochelys imbricate*), Hawaiian monk seal (*Monachus schauinslandi*), Humpback whale (*Megaptera novaeangliae*), Spinner dolphin (*Stenella longirostris*), Bottlenose dolphin (*Tursiops truncates*) and Hawaiian hoary bat (*Lasiurus cinereus semotus*). Each HIREP provider of energy shall undertake comprehensive measures in identifying and developing mitigation measures as thoroughly as practicable for these efforts will be given much scrutiny while under review and comment.

Federal Migratory Bird Treaty Act

All native migratory birds of the United States are protected under the Migratory Bird Treaty Act (MBTA) of 1918, as amended.⁸ The primary bird species covered in the HIREP EISPN such as the Hawaiian petrel (*Pterodroma sandwichensis*), Newell's shearwater (*Puffinus auricular's newelli*), Hawaiian stilt (*Himantopus mexicanus knudseni*), as well as the Hawaiian hoary bat or ope'ape'a,⁹ and several other non-listed bird species in the potential project vicinities, are protected under the MBTA.

⁴ 50 CFR 17.3.

⁵ 50 CFR 17.3.

⁶ Id.

⁷ See, e.g., HIREP-Wind EISPN at pp. 3-10 to 3-11, Table 3-1—"Native Plant Species"; pp. 3-12 to 3-13, Table 3-2—"Common Birds"; and p. 3-14, Table 3-3—"Threatened and Endangered Terrestrial Plants and Wildlife."

⁸ 16 USC 703-712 et seq.

⁹ The Hawaiian hoary bat is also covered by the ESA, discussed *supra*.

This act states that it is unlawful to pursue, hunt, take, capture or kill; attempt to take, capture or kill; possess, offer to or sell, barter, purchase, deliver or cause to be shipped, exported, imported, transported, carried or received any migratory bird, part, nest, egg or product. "Take" is defined as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect."¹⁰ No process for authorizing incidental take of MBTA-protected birds or providing permits is described in the MBTA.¹¹ Nonetheless, should any HIREP wind energy provider be approved and USFWS issues an incidental take permit (ITP), or NMFS issues an incidental take authorization (ITA), there are still additional regulatory compliance considerations with respect to incidental harassment of endangered species under the Marine Mammal Protection Act of 1972 (MMPA).

Federal National Historic Preservation Act

The National Historic Preservation Act of 1966 (NHPA) is the primary Federal law protecting cultural, historic, Native American, and Native Hawaiian resources. Section 106 of the NHPA¹² requires Federal agencies to assess and determine the potential effects of their proposed undertakings on prehistoric and historic resources (e.g., sites, buildings, structures, and objects) and to develop measures to avoid or mitigate any adverse effects. Detailed requirements for complying with Section 106 are addressed in regulations promulgated by the Advisory Council on Historic Preservation (ACHP) under 36 CFR 800.

For example, USFWS issuance of an incidental take permit (ITP) under ESA Section 10(a)(1)(B) is considered an "undertaking" covered by the ACHP and must comply with Section 106 of NHPA. Accordingly, USFWS must consult with the ACHP, the State Historic Preservation Officer (SHPO), affected Native Hawaiian Organizations (NHOs), the applicant, and other interested parties, and make a good-faith effort to consider and incorporate their comments into project planning. Thus, meaningful consultation under Section 106 will be required for every conceivable type of permit needing approval; programmatic approvals being avoided for the sake of establishing a well-developed knowledge base to assist with sound decision-making.

Section 800.16(d) of the ACHP regulations requires agencies to determine the area of potential effects (APE), defined as "the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist." Again, as an example, the USFWS generally interprets the APE as the specific location where incidental take may occur and where ground-disturbing activities may affect historic properties. In the HIREP regime, however, it does appear that the APE will involve multiple islands, ocean channels, air-scapes, benthic environments, and so on as a whole, in addition to each "specific location" similarly undergoing stringent analyses—this relates to the investigation of cumulative impacts.

¹⁰ See, *supra*, fn. 8.

¹¹ Cf. ESA (USFWS) and Marine Mammal Protection Act of 1972 (MMPA) (National Marine Fisheries Service/NMFS).

¹² 36 CFR 800.

Executive Order 12898—Environmental Justice

President Clinton issued Executive Order 12898 on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations on February 11, 1994. EO 12898 requires Federal agencies to take appropriate steps to identify and avoid disproportionately high and adverse effects of Federal actions on the health and surrounding environment of minority and low-income persons and populations. All Federal programs, policies, and activities that substantially affect human health or the environment shall be conducted to ensure that the action does not exclude persons or populations from participation in, deny persons or populations the benefits or, or subject persons or populations to discrimination under such actions because of their race, color, income level, or national origin. The EO was also intended to provide minority and low-income communities with access to public information and public participation in matters relating to human health and the environment.

The U.S. Environmental Protection Agency (USEPA), working with the Enforcement Subcommittee of the National Environmental Justice Advisory Council, has developed technical guidance to ensure that environmental justice concerns are effectively identified and addressed throughout the NEPA process. The State of Hawai'i has also developed its own legislation and guidance related to environmental justice. Act 294 was signed by Governor Lingle in July 2006 to define environmental justice in the unique context of Hawai'i and to develop and adopt environmental justice guidance document that addresses environmental justice in all phases of the environmental review process.

STATE AND LOCAL REGULATORY CONTEXT

Hawai'i State Plan

The Hawai'i State Plan is a policy document intended to guide the long-range development of the State of Hawai'i by: Identifying goals, objectives, and policies for the State of Hawai'i and its residents; establishing a basis for determining priorities and allocating resources; and providing a unifying vision to enable coordination between the various counties' plans, programs, policies, projects and regulatory activities to assist them in developing their county plans, programs, and projects and implementing laws and regulations to achieve its goals.

Hawai'i Revised Statutes, Chapter 343 & Chapter 6E

HRS Chapter 343 (Environmental Impact Statements) was developed "to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision-making along with economic and technical considerations."¹³ This chapter requires the development of an EIS, which is an informational document that discloses the effects of a proposed action on the environment, economic welfare, social welfare, and cultural practices, as well as mitigation measures and alternatives to the action. Based on recent discussions prompted by a joint Federal-State effort, the project areas

¹³ HRS §343-1.

appear to be located on a mixture of land ownership with majority of the infrastructure impacting surface and submerged lands State lands; these are triggers for Chapter 343 review.

Due to the enormity of HIREP-Wind, OHA asks that due consideration be given to the possibility of EISs being conducted for individual wind stations depending on how culturally or environmentally sensitive the areas being impacted may be. OHA also asks for an analysis on the issue of ceded lands and the potential socio-economic ramifications to its mandate and fiduciary duties.

HRS Chapter 6E is the benchmark for assessing historic preservation issues and follows from the same policy considerations giving rise to HRS Chapter 343. In addition, Hawaii Administrative Rules (HAR) Chapter 13-300 provides the nuts and bolts in implementing some of the requirements in HRS Chapters 343 and 6E, with one especially important provision calling for archaeological inventory surveys (AIS).¹⁴ OHA requests that all HIREP-Wind projects provide suitable archaeological survey plans with coverage appropriate under the circumstances. In some cases this translates into extensive AIS efforts and work.

In 2000, the Legislature enacted Act 50, Hawai'i Session Laws, amending the State's EIS law to require a Cultural Impact Statement (CIA) whenever an EA or EIS was conducted. The requiring of CIAs was in sharp response to court decisions acknowledging the absence of such analyses in the decision-making and permitting of major construction and impacts to Native Hawaiian cultural practices and resources. A CIA requires, among other things, a good faith effort to develop an informed understanding by identifying and mitigating cultural impacts brought by construction projects via outreach and consultation with organizations and individuals having such knowledge or expertise.¹⁵

Hawai'i Revised Statutes, Chapter 195D

The purpose of Chapter 195D, HRS (Conservation of Aquatic Life, Wildlife, and Land Plants), is "to insure the continued perpetuation of indigenous aquatic life, wildlife, and land plants, and their habitats for human enjoyment, for scientific purposes, and as members of ecosystems"¹⁶ Section 195D-4 states that any endangered or threatened species of fish or wildlife recognized by the ESA shall be so deemed by State statute. Like the ESA, the unauthorized "take" of such endangered or threatened species is prohibited.¹⁷ Under Section 195D-4(g), the Board of Land and Natural Resources (BLNR), after consultation with the State's Endangered Species Recovery Committee (ESRC), may issue a temporary license (also referred to as an incidental take license—ITL) to allow a take otherwise prohibited if the take is

¹⁴ See, e.g., HAR §13-300-31(b).

¹⁵ See, *infra*, section on "Community Plans" concerning potential sources for much needed CIA informants. For example, given the passing of many cultural historians through the course of time, the Lāna'i Community Plan (1998) reports the existence of 13 hours of oral histories concerning Lāna'i's past recorded in 1963 by the Bishop Museum that are inventoried but remain non-transcribed. These vital histories should be recognized as important resources whose contents should be transcribed and incorporated with the HIREP EISP/PEIS/Individual EIS review process.

¹⁶ HRS §195D-1.

¹⁷ HRS §195D-4(e).

incidental to the carrying out of an otherwise lawful activity. The "lawful activity" requirement can only be met, however, if and when an applicant obtains all required permits and passes legal muster.

Hawai'i Revised Statutes, Chapter 205

Under the State Land Use Law,¹⁸ HRS Chapter 205, all lands and waters in the State are classified into one of four districts: Agriculture, Rural, Conservation, or Urban. Conservation Districts, under the jurisdiction of DLNR, are further divided into five subzones: Protective, Limited, Resource, General, and Special. The use of Conservation District lands is regulated by HRS Chapter 183C and Hawai'i Administrative Rules (HAR) Chapter 13-5.

The HIREP-Wind model being vetted will likely enter lands in the General subzone of a State Conservation District and well-established preservation areas. Lands within a Conservation District are typically utilized for protecting watershed areas, preserving scenic and historic resources, and providing forest, park, and/or beach reserves.¹⁹ As with other Conservation District lands, the prospective project areas may not be subject to any County zoning or community plan designations or restrictions; however, until individual HIREP-wind applicants file plans showing actual project details and locations, local regulatory schemes must still be considered in the EIS process. The HIREP model is expected to encompass a variety of lands and land classifications that will trigger regulatory review on all levels of government and community.

Hawai'i Revised Statutes, Chapter 198D

Established in 1988, the State Na Ala Hele Trails and Access Program²⁰ is a statewide trail and access program administered by the Hawai'i Division of Forestry and Wildlife (DOFAW). The primary purpose of the program is to ensure adequate public access to coastal and mountain trails and roads. DOFAW has the authority to regulate the use of trails and access for the following purposes: 1) to preserve the integrity, condition, naturalness, or beauty of the trails or accesses; 2) to protect the public safety; or 3) to restrict public access to protected or endangered wildlife habitats, except for scientific or educational purposes. While the only designated trail on Lāna'i that may be affected is the Awalua Kahue Trail, which is closed at present,²¹ there is no reason to dismiss its reopening or the possibility of other trails being established by Na Ala Hele Trails and Access Program within the APE.

¹⁸ Act 187.

¹⁹ Subsection 205-2(e), HRS.

²⁰ HRS §198D.

²¹ The Na Ala Hele Trails and Access Program's website identifies four (4) access trails on the island of Lāna'i and displays Awalua Kahue Trail in the western region where talks of wind farming may be taking place. The website indicates the trail is "closed" following the "difficulty" prompt.

Hawai'i's Coastal Zone Management Program

The State Coastal Zone Management (CZM) Program²² is designed to protect valuable and vulnerable coastal resources by reducing coastal hazards and improving the review process for activities proposed within the coastal zone. The CZM Program focuses on ten (10) objectives and policies related to the following: recreational resources; historic resources; scenic and open space resources; coastal ecosystems; economic uses; coastal hazards; managing development; public participation; beach protection; and marine resources. The CZM Program also includes a permit system to control development within Special Management Areas (SMAs), which include lands within 300 feet (91 meters) from the shoreline. The HIREP interisland undersea cable system is necessarily triggering the need for assessment through the CZM Program.

Maui County General Plan

The *General Plan of the County of Maui* (1990) established a vision and a set of long-range guiding principles, goals, objectives, policies, and maps to guide growth and development of the island. The Plan was adopted by Ordinance No. 2039 on September 27, 1991, and was amended on April 23, 1993, by Ordinance No. 2234. An update of the *General Plan of the County of Maui* is underway, and the *Draft 2030 General Plan* outlining the County's development policies up to the year 2030 was circulated for comment in January 2008. Public review of the *Draft 2030 General Plan* is continuing.

The *Draft 2030 General Plan* consists of three (3) tiers of planning documents: 1) Countywide Policy Plan, 2) Maui Island Plan, and 3) Community Plans. The Draft Countywide Policy Plan provides a policy framework for the development of the Maui Island Plan and nine community plans that will address the unique character of each of the four islands within the County.

Community Plans

The *Moloka'i Community Plan* (2001) and the *Lāna'i Community Plan* (1998) account for two of the nine plans for Maui County and both share a common vision. Covering a multiplicity of issues unique to these rural, 'ohana oriented communities, each plan outlines goals, policies, and implementing actions designed to educate decision-makers on the pressing concerns and priorities.

One common goal concerns the environment and policy measures to protect and enhance land, water and marine environmental resources and to perpetuate resource values which may be enjoyed and respected by future generations of residents and visitors. There is broad emphasis concerning cultural resources and goals to identify, preserve and where appropriate, restore and promote such cultural resources and practices which reflect the rich and diverse heritage found on Moloka'i and Lāna'i.

²² HRS §205A-2.

Potential providers of HIREP-Wind energy must consider these goals to guide decision-making in a number of subject areas having community-wide impact. Simply interpreted, the goals are those broad statements which identify a preferred future condition. The objectives and policies specify steps and measures to be taken to achieve the stated goal. And, the implementing actions identify specific programs, project requirements and activities necessary to successfully bring reality to the desired goal.

With the passing of time these small town communities suffer greatly with the loss of each and every kupuna possessing 'ike passed down orally through the generations. Thus, it becomes increasingly vital that all meaningful sources be consulted, including a reported 13 hours of Lāna'i kama'āina oral histories taken by the Bishop Museum in 1963²³ which should be transcribed for purposes useful in this ongoing HIREP environmental/cultural review.

While many are aware of the recent HIREP-Wind scoping meetings held on several islands, coupled with negotiations about community benefits packages, the HIREP-Wind PEIS should incorporate the depth of vision, goals, policies and implementing actions supplied by the community plans in conjunction with the testimony and comments responding to this HIREP EISPN.

University of Hawai'i's Land Study Bureau Detailed Classification

The University of Hawai'i's Land Study Bureau developed a Detailed Land Classification that estimates agricultural productivity ratings using the letters "A" through "E." "A" represents the class of highest productivity and "E" the lowest. Noteworthy is the finding of certain Lāna'i pineapple farm lands (now abandoned) having been classified "D" and "E" and, therefore, presumptively of poor agricultural value. Once specific lands are identified for potential wind farming, a reference to the Detailed Land Classification can be made; however, if proposed project area lands are not designated in the Agricultural District, this classification system is not applicable and is not discussed further.

OHA

OHA is guided by Article XII, Section 7, of the Constitution of the State of Hawai'i, which states:

TRADITIONAL AND CUSTOMARY RIGHTS, Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to

²³ The Lāna'i Community Plan (1998) points out the existence of these non-transcribed oral histories inventoried at the Bishop Museum. Transcription of these oral histories would provide knowledge with which to render appropriate decision-making identifying and mitigating potential cultural and environmental impacts.

1778, subject to the right of the State to regulate such rights. [Add Const Con 1978 and election Nov 7, 1978.]²⁴

OHA has substantive obligations to protect the cultural and natural resources of Hawai'i for its beneficiaries and for the public good. Hawai'i law mandates OHA to “[s]erve as the principal public agency in the State of Hawaii [*sic*] responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; . . . and [t]o assess the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians.”²⁵

It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs. [L 1979, c 196, pt of Section 2]²⁶

OHA is a principal advocate for the protection of traditional cultural properties and all related resources including, among other things, preservation of archeological and historic properties, perpetuation of traditional and cultural practices, and enhancement of its beneficiaries' well-being. OHA anticipates ongoing consultation throughout HIREP's lifespan.

Public Trust Doctrine

Over three decades ago, the State Legislature declared:

The Constitution of the State of Hawaii recognizes the value of conserving and developing the historic and cultural property within the State for the public good. The legislature declares that the historic and cultural heritage of the State is among its important assets and that the rapid social and economic developments of contemporary society threaten to destroy the remaining vestiges of this heritage. The legislature further declares that it is in the public interest to engage in a comprehensive program of historic preservation at all levels of government to promote the use and conservation of such property for the education, inspiration, pleasure, and enrichment of its citizens. The legislature further declares that it shall be the public policy of this State to provide leadership in preserving, restoring, and maintaining historic and cultural property, to ensure the administration of such historic and cultural property in a spirit of stewardship and

²⁴ This key provision, along with a body of case law (*Kalipi* and its progeny) beginning with the 1970's Native Hawaiian Renaissance, has reestablished and recognized the utility of Native Hawaiian rights and practices in all sectors in modern day Hawai'i.

²⁵ HRS § 10-3.

²⁶ HRS § 10-1(b).

trusteeship for future generations, and to conduct activities, plans, and programs in a manner consistent with the preservation and enhancement of historic and cultural property.²⁷

The public trust doctrine is a focal point from which planning for implementation of the State's HCEI goals must be evaluated. In addition, Act 50 (CIAs) represents a mandate for reconciling competing interests where the primary function of identifying cultural impacts and developing mitigative measures is to satisfy constitutional scrutiny.

OHA is acutely aware of the State's desire to develop renewable energy sources, partly to address the scarcity and exorbitant cost of fossil fuels; however, OHA requests a more rational approach and discussion on alternatives. Currently, the HIREP Wind EISPN provides only two alternatives: 1) having wind farms or 2) having no wind farms.

HIREP-Wind development/operations will interrupt access to and absorb large tracts of pristine, undeveloped lands depended upon by generations past and future for subsistence, gathering rights and cultural, religious purposes and so on. OHA requests a comprehensive analysis on the impacts/mitigations for these public trust resources anticipated during construction and covering a post-construction period of 20-years at minimum.

Native Hawaiian Rights

In *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission (PASH)*,²⁸ the Hawai'i Supreme Court, recognizing over 150 years of court decisions validating the existence of Native Hawaiian traditional and customary rights as part of the State's common law, reiterated that:

The State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians.²⁹

Then in *State of Hawai'i v. Hanapi (Hanapi)*,³⁰ the court had the opportunity to expand the shift from limiting gathering rights to "undeveloped land" to protecting gathering rights unless the land was "fully developed." The court clarified its *PASH* ruling on whether the

²⁷ HRS § 6E-1; derived from *Haw. Const. Art. XII, § 4*—Public Trust—The lands granted to the State of Hawai'i by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public. [Add Const Con 1978 and election Nov 7, 1978].

²⁸ 79 Haw. 425, 903 P.2d 1246 (1995).

²⁹ *Id.*

³⁰ 89 Haw. 177, 970 P.2d 485 (1998).

allowance or enforcement of traditional Hawaiian gathering rights may be inconsistent on property that had reached the point of full development:

Our intention in *PASH* was to examine the degree of development of the property, including its current uses, to determine whether the exercise of constitutionally protected [N]ative Hawaiian rights on the site would be inconsistent with modern reality. To clarify *PASH*, we hold that if property is deemed “fully developed,” i.e., lands zoned and used for residential purposes with existing dwelling, improvements and infrastructure, it is *always* “inconsistent” to permit the practice of traditional and customary [N]ative Hawaiian rights on such property. In accordance with *PASH*, however, we reserve the question as to the status of [N]ative Hawaiian rights on property that is “less than fully developed.”³¹ [Italics in original]

Thus, the court reserved the question as to the status of Native Hawaiian rights on property that is “less than fully developed.” It went on to explain how a traditional or customary Native Hawaiian practice could be established from expert testimony and kama‘āina witness testimony:

There must be an adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary [N]ative Hawaiian practice.³²

The *Hanapi* court developed a three-prong test: (1) persons asserting gathering rights must be descendants of Native Hawaiians who resided in the Hawaiian Islands prior to 1778; (2) constitutionally protected gathering rights must bear adequate foundation connecting the claimed right to a firmly rooted traditional or customary Native Hawaiian practice; and (3) rights must be exercised on undeveloped or less than developed land.

In *Ka Pa‘akai O Ka ‘Āina v. Land Use Commission (Ka Pa‘akai)*,³³ the Hawai‘i Supreme Court, noting again it was clear that the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians, to the extent feasible, noted the findings of the Hawai‘i State Legislature in 2000 that:

[T]he past failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture. The legislature further finds that due consideration of the effects of human activities on native Hawaiian

³¹ Id. at 186-187 and 494-495.

³² Id.

³³ 94 Haw. 31, 7 P.3d 1068 (2000).

culture and the exercise thereof is necessary to ensure the continued existence, development, and exercise of native Hawaiian culture.³⁴

The *Ka Pa'akai* court also noted:

With regard to native Hawaiian standing, this court has stressed that "the rights of native Hawaiians are a matter of great public concern in Hawaii [sic]."³⁵

Ka Pa'akai also set forth an analytical framework, in that instance for the Land Use Commission to adhere to, that all State and County entities should follow in the proper analysis of cultural impacts:

(1) Identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) Extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) Feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.

Given this set of jurisprudence, the HIREP-Wind PEIS should require a comprehensive, detailed analysis addressing the potential impacts to protected Native Hawaiian rights and measures for their mitigation with a view towards the next 20-years at minimum.

CONCLUSION

OHA remains committed to the proposition that what is good for Native Hawaiians is true for all Hawai'i nei and its residents. This is OHA's vision:

To mālama Hawai'i's people and environmental resources and OHA's assets, toward ensuring the perpetuation of the culture, the enhancement of lifestyle and the protection of entitlements of Native Hawaiians, while enabling the building of a strong and healthy Hawaiian people and nation, recognized nationally and internationally.

OHA considers HIREP-Wind the largest investment in Hawaii's history that brings with it all the risks associated with any major, unprecedented venture. It could be great if it succeeds, but at what cost and at whose cost. This is what concerns many of Hawai'i's citizenry, and OHA is no exception. It is premature to finalize the necessary decisions that would determine HIREP-

³⁴ Act 50, H.B. NO. 2895, H.D. 1, 20th Leg. (2000).

³⁵ *Pele Defense Fund v. Paty*, 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992), *cert. denied*, 507 U.S. 918, 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993).

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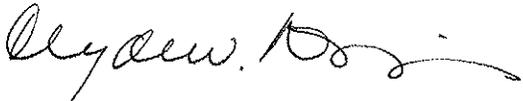
Wind's future, and how ever auspicious a start the program has experienced thus far can be overcome with more communication and consultation.

Just as much as the crowds who assembled at the various official scoping meetings and voiced their testimony, expectations and desires to be engaged in continued ongoing community consultation and dialogue, OHA hereby expresses those very sentiments in the interest of transparency and affecting a good result.

Finally, OHA offers the following: He ali'i nō ka 'āina, ke kauwā wale ke kanaka—"The land is the chief, the people merely servants." It is advisable that HIREP-Wind proponents find meaningful ways to seek guidance from the land to gain wisdom from the 'āina itself and what it is able or unable to support. Centuries of Hawaiians have endured these lands, and several notable Lāna'i contemporaries dating from the Gibson, Hayselden, Baldwin and Dole periods have experienced varying degrees of success but faced mostly hardships. OHA respectfully requests that you regard it well.

Mahalo for this opportunity to comment. OHA looks forward to reviewing the Draft PEIS. Should you have any questions, please contact Jerome Yasuhara at (808) 594-0129 or by email at jeromey@oha.org.

'O wau iho nō, me ka ha'aha'a,



Clyde W. Nāmu'o
Chief Executive Officer

c: OHA Chairperson Colette Machado